SUPREME COURT, U. S.
FILED
JAN 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Petitioners,*

v.

CITY OF CINCINNATI, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Cincinnati District Council 51, American Federation of State, County, Municipal Employees, AFL-CIO, and American Federation of State, County, Municipal Employees, AFL-CIO, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Ohio are reported at 35 Ohio State 2d 197, 299 N.E. 2d 686. They are reprinted in App. A *infra*. The opinion of the Court of Appeals, First Ap-

pellate District, is not reported; it is reprinted in App. C *infra*. The decision and judgment of the Court of Common Pleas of Ohio, Hamilton County, are not officially reported. They are reprinted in App. D *infra*.

JURISDICTION

The decision of the Supreme Court of Ohio was issued on July 18, 1973, and a timely petition for rehearing was denied on September 6, 1973, App. B *infra*. By orders dated November 21, 1973, and December 20, 1973, Mr. Justice Stewart extended the time for filing this petition for certiorari to January 4, 1974, and further to January 9, 1974. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Where an order to show cause charges only that the defendants were in civil contempt of an injunction, may defendants be subjected to civil and criminal penalties for more than thirty separate violations?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth and Section 1 of the Fourteenth Amendments to the Constitution of the United States. They are reprinted in App. F *infra*.

STATEMENT OF THE CASE

A. Proceedings in the Court of Common Pleas.

1. The Injunction and the Order To Show Cause.

This case arises out of an action for an injunction, brought on January 4, 1970, by the City of Cincinnati against Cincinnati District Council 51, American Federation of State, County, Municipal Employees, AFL-CIO (hereafter "Council 51"), its officers and six local

unions affiliated with Council 51 and their officers, to enjoin them from engaging in a strike against the City (R. 1-5).[1] Petitioner American Federation of State, County and Municipal Employees, AFL-CIO (hereafter "the International") is an International union with which Council 51 is affiliated. The International was not a party to the injunction action. On January 4, 1970 a temporary restraining order was issued by the Court of Common Pleas (R. 5).

On January 6, a final judgment and permanent injunction was entered by Judge Morrissey "restraining and enjoining the defendants from carrying on a strike and/or picketing against the City of Cincinnati (R. 7)." On January 7, 1970, upon charges by the City alleging violation of the temporary restraining order on January 5 and 6 (R. 10), ten individuals and Council 51 were held in contempt and were fined in amounts ranging from $200 to $500 and sentenced to the workhouse, the jail sentences being suspended in some cases (R. 13). Council 51, in addition to being fined $200, was required to post a security bond of $7,800 consisting of checked-off Union dues then being held by the City for the account of Council 51 (R. 14).

The strike continued. On February 5, 1970 a settlement agreement was arrived at by Council 51 and the City Manager (R. 206). Following ratification of the agreement, employees started to return to work on Sunday. February 8 and all were back by February 9 (R. 140). The February 5 agreement provided, *inter alia,* for the dismissal of the injunction action, the dissolution of the injunction and a joint request to the

[1] R. is a reference to the printed "Record" in the Supreme Court of Ohio.

Court by the City and Council 51 for the dismissal of all pending contempt proceedings arising out of said injunction and the remission of all contempt sentences and other penalties against any employees or union representatives for the alleged violation of said injunction (R. 206).

On February 6, 1970 an Application to Intervene (R. 17) was filed by respondent Goldberg, a taxpayer, pursuant to § 733.581 of the Ohio Revised Code (R. 21), to recover in behalf of the City, damages it had allegedly suffered as a result of the defendants' violation of the injunction. This application was opposed by Council 51 and the City, but was granted without opinion.

On June 26, 1970 Intervenor instituted a new contempt proceeding by motion for an order to show cause directed against defendant Council 51, all of the local unions and the thirty-three individuals who had been named as defendants in the original complaint, plus petitioner International and two of its representatives (R. 55). This was the first time the International became a party. The motion requested that said persons and organizations show cause why they should not be held in contempt, why they should not be punished for *"such contempt"* and why they should not be required to pay damages to the City of Cincinnati.[2] On August 25, 1970 the Court issued an order (R. 62-64) reprinted in full as App. E *infra*. That order required the named persons and organizations to show cause why they should not be "held in contempt for violating this Court's permanent injunction" and why they should not pay "damages to the plaintiff for civil contempt

[2] R. 56, emphasis added here, and throughout this Petition unless otherwise specified.

in such amount, if any, as the Court may find *such violation* has damaged plaintiff".

At the time of the return of the Order to Show Cause, at a conference in the Court's chambers, defendants requested specifications of the contempt charges. Intervenor's counsel indicated that he might provide them, but he never did. Accordingly, at the commencement of the contempt hearing on September 21, 1970, defendants moved to dismiss on the ground that the supporting affidavit was insufficient since "it does not apprise the parties affected with any information as to the act which they are alleged to have committed which is said to be in contempt"; "that this is essentially a criminal proceeding, the accused are entitled to know what they are charged with that constitutes alleged contempt", and that the proceeding be dismissed unless specifications were provided forthwith "so that we know what we are charged with" (R. 64-66). Intervenor refused to provide any specifications, stating that "The contempt of Court continued from the beginning to the end" and that "to specify details would take away from the claim" (R. 66); he stated further, that the court should award damages to the City "against these organizations and individuals because of their continuous violation of the court order, by their participating in the strike, encouraging the strike, up until the time of concluding. Therefore the details are unnecessary" (R. 66). The motion for specifications of the charge and, in the alternative, to dismiss was overruled (id.).

During the course of the trial the Court dismissed the proceedings with respect to all of the named individuals and the case proceeded solely against the named labor organizations.

2. The Evidence on Liability.

In the contempt proceedings there was no dispute about Council 51's participation in the strike and hence its violation of the injunction. The only controverted issue of liability was whether the International was in contempt of the injunction.[3]

We now set forth the evidence adduced against the International:

The strike was called on January 4 and began on January 5 (R. 10). The International was in no way involved in the calling of the strike (R. 169). The International learned that a strike had started within twenty-four hours (R. 170) but there was no evidence, direct or circumstantial, as to when the International first had notice of the injunction.

Some time after January 5, the exact date being unproved, the International sent representatives Epps and Brindza to Cincinnati with instructions to try to bring the dispute to a speedy conclusion (R. 68, 171). Each of these representatives was in Cincinnati for a part of the time during the strike, but the dates were not proven. Van Hagen, the Director of Council 51, was jailed for contempt on January 8 and remained incarcerated until January 17. While he was in jail he was visited by certain unidentified representatives of the International on unspecified dates (R. 173).

The testimony of a newspaper reporter constitutes the only evidence of activity on the part of representatives of the International on specific dates. The first

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[3] The other major issue concerned the amount of damage, if any, suffered by the City as a result of the strike.

date as to which he testified concerning *any* action by the International was January 17, at which time Brindza addressed a union meeting and made statements which could be construed as supporting the strike (R. 124). He also testified that on January 31 Epps had said the "Cincinnati local will escalate peaceful demonstrations" at business establishments in the city (R. 120); this statement was made before the injunction was broadened to restrain action of that kind (R. 16).

It was stipulated that the International contributed $20,000 to Council 51 during the strike for the relief of hardship among the members of Council 51 as a result of the strike by payments in two installments of $10,000 each on January 27, 1970 and February 4, 1970 (R. 146).

No evidence was offered concerning the relationship between the International and Council 51, their constitutions and bylaws are not in the record, no claim was made or proof offered of a principal-agent relationship between them. This is the sum total of the evidence on which the trial court found appellant International guilty of separate contempts of the January 6, 1970 permanent injunction on thirty-seven days from January 4 to February 9, inclusive.

There was no evidence whatever of any strike activities by either petitioner subsequent to the execution of the Memorandum of Settlement on February 5, 1970. It is uncontradicted that the employees started to return to work on Sunday, February 8, that all were back by the 9th and that all strike activities had ceased as of those dates (R. 140).

3. The Trial Court's Decision and Judgment.

On July 28, 1971, the Court issued its oral decision as follows:

> "In regard to the contemptuous behavior of the striking organizations, evidence having been produced at prior date indicating the strike to be 37 days, the Court hereby levies a fine of $1,000 for each day of the strike equal to the sum of $37,000." (p. 27a *infra*).

At no time prior to the decision of the trial judge had there been any intimation that petitioners were accused of more than one act of contempt, much less thirty-seven separate contempts. In response to questions of counsel, the Court explained that the sum $37,000 was to be distributed *pro rata* among the petitioners (*id.*); that other monies paid by the unions would be credited, and that "the balance in round figures, about $25,800, if possible, will be split between the City of Cincinnati and the County of Hamilton, to be the sum equal to the amount applicable to the City as damages, and the balance to be applicable to the County by way of fines." (p. 28a *infra*).

On September 14, 1971 judgment was entered against the petitioners accordingly (pp. 28a-33a *infra*).

B. Proceedings on Appeal.

The Court of Appeals, Hamilton County, unanimously affirmed the judgment in its entirety. The Supreme Court of Ohio granted discretionary review. Thereafter, the Supreme Court affirmed the judgment of the Court of Appeals in all respects except that it reversed it with respect to the finding that the defendants were in contempt of the permanent injunction on

the two days prior to its issuance (pp. 15a, 20a-21a *infra*). The Court squarely rejected the defendants' claim "that they were denied due process of law in that they were not notified that the proceeding against them involved multiple contempts." (p. 5a *infra*).[4]

The gist of the Court's decision on the constitutional issue was that the defendants were not prejudiced by the absence of such notice:

> "The show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt) and the reason for the proceeding (violation of the permanent injunction previously entered). That the order did not mention that 37 contempts would be punished did not work prejudice against the appellant union. Each of these separate contempts was the same as the others, i.e., that the appellants conducted a strike in violation of the permanent injunction. Furthermore, appellants were certainly aware of the number of days they remained on strike.
>
> "Appellants strenuously assert that they were prejudiced by lack of notice. Nowhere, however, do they indicate the precise nature of this prejudice. The most that appellants assert is that 'appellants, not having been advised that they were charged with thirty-seven separate contempts, made no effort to defend against such a charge.' This argument is sound so far as it goes, but it

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[4] While the Court did not discuss the issue in terms of the United States Constitution, the federal claim was squarely raised:

> "The constitutional right to due process of law, guaranteed by the Fifth Amendment of the Constitution of the United States, the fundamental concept of fair trial and the governing principle in contempt cases of strict construction in favor of the accused require that this multiple contempt judgment be set aside." (Appellants' brief in the Supreme Court of Ohio, p. 20, quoting *Cooke* v. *U. S.*, 267 U.S. 517, 537).

> does not go far enough. No evidence was introduced or argument advanced to show how appellants would have defended differently had they been fully aware that 37 contempts were involved. Although appellants argue that prejudice could have arisen, they totally fail to demonstrate that prejudice actually arose in this case." (pp. 7a-8a *infra*).

In light of the Court's holding that the show cause order apprised the defendants that the nature of the proceeding was in civil contempt, one additional ruling must be mentioned. The defendants had urged that because a jury may not be had in contempt proceedings the award of damages is a denial of a jury trial provided by Article I, § 5 of the Ohio Constitution which provides for the right to jury in civil cases. In rejecting that contention the Court held in part: "The present case involves both civil and criminal aspects." (p. 11a *infra*, following, *inter alia*, *United States* v. *United Mine Workers*, 330 U.S. 258, 299).

Two Justices would have reversed the judgment outright on the ground that the respondent taxpayer's motion to intervene should not have been granted (pp. 15a-16a *infra*); they therefore reached no other issues. A third Justice was of the opinion that the Trial Court abused its discretion in levying fines for more than a single contempt (pp. 16a-17a *infra*).

REASONS FOR GRANTING THE WRIT

I. The Courts Below Denied Petitioners Due Process of Law in Its Primary Sense.

In *Cooke* v. *United States*, 267 U.S. 517, 537, Chief Justice Taft wrote:

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in

> open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation."

In *Morgan* v. *United States,* 304 U.S. 1, 18, Chief Justice Hughes wrote:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

It was in this tradition that Chief Justice Burger, writing for a unanimous court, held in *Groppi* v. *Leslie,* 404 U.S. 496, 502-503, that (except where summary disposition is essential) even a legislature must give notice and an opportunity to be heard before it may impose punishment for contempt.

> "Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.' *In re Oliver,* 333 U. S. 257, 273 (1948). See, *e. g., Joint Anti-Fascist Committee* v. *McGrath,* 341 U. S. at 143, 164-165, 171-172, 178, 185 (concurring opinions of Black, Frankfurter, Douglas, and Jackson, JJ.); *Cole* v. *Arkansas,* 333 U. S. 196, 201 (1948). We have emphasized this fundamental principle where rights of less standing than personal liberty were at stake. *E. g., Sniadach* v. *Family Finance Corp.,* 395 U. S. 337 (1969); *Morgan* v. *United States,* 304 U. S. 1, 18 (1938); *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). In *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306 (1950), the Court stated:
>
> Many controversies have raged about the cryptic and abstract words of the Due Process Clause

> but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. 339 U. S., at 313."

The judgment below cannot be reconciled with "this fundamental principle." It allowed petitioners to be punished both civilly and criminally on thirty-five separate counts of contempt although, in the order to show cause, issued by the Trial Court, they were charged only with a "violation" of the injunction.

The Supreme Court of Ohio concluded that the "notice was clearly sufficient to apprise the appellants of the charge against them and to enable them to prepare a defense" (p. 8a *infra*). But an order to show cause of this generality is insufficient to comply with constitutional requirements. As stated in *United States* v. *Cruikshank,* 92 U.S. 542, 558:

> "It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' "

This holding was reaffirmed in *Russell* v. *United States,* 369 U.S. 749, as stating "basic principles of fundamental fairness" (*id.* at 765-766) required by the due process clause of the Fifth Amendment (applicable in both civil and criminal proceedings) as well as the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation" (*id.* at 761).

The Ohio Supreme Court's basic premise for the conclusion that the petitioners received sufficient notice was that they had not shown prejudice (pp. 7a-8a *infra*). In so holding, the Court did not "declare a belief that" the failure to give notice "was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24. On the contrary, it imposed on petitioners a burden of demonstrating prejudice which effectively nullifies that constitutional right. The Court stated that petitioners "were certainly aware of the number of days they remained on strike" (p. 7 *infra*). This is, of course, true, but petitioners did not know that "the number of days they remained on strike" would be in issue.

Plainly, the defendant in any case is aware of his actual conduct. But the purpose of giving him notice is to apprise him what conduct is charged to be illegal. It must focus the issues so that he can prepare a defense. In short, if the defendants' own knowledge of the circumstances is sufficient to eliminate prejudice, the constitutional right to notice can hardly survive.

In many cases the existence of prejudice from a lack of notice of the specific elements of the offense charged while real, can only be hypothesized. In the present case, prejudice can readily be shown.

We may usefully begin with the point that the court below stated the petitioners knew—the number of days that they remained on strike. The Trial Court itself was so confused on this that it found defendants guilty of violating the permanent injunction for two days before that injunction was entered, as well as for at least one day (February 9) when the record showed

that all persons had returned to work, and as to which it was *stipulated* that "there was no strike activity going on" (R. 140). The Ohio Supreme Court reversed as to the first two days, but, despite petitioners' specific claim of error, sustained the finding of violations through February 9. In doing so, it ignored this stipulation, as well as the circumstance that due to the generality of the charge, petitioners had no occasion to establish, as a defense with respect to the separate violations found, that they had done everything possible to discontinue the strike after the settlement agreement had been entered into (on February 5).

The courts below were confused also with respect to the nature of the offense. The order to show cause stated squarely that defendants were being charged with "civil contempt" (p. 35 *infra*). The Supreme Court stated, in overruling the objection of inadequate notice, that the "show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt)" (p. 7a *infra*).[5] Yet the Trial Court imposed mixed civil and criminal penalties on defendants (p. 33a *infra*); and the Supreme Court sustained the denial of a jury trial on the ground that the "present case involves both civil and criminal aspects" (p. 11a *infra*).

The foregoing examples are sufficient, we submit, to establish prejudicial inadequacies of the notice as to both petitioners. But the prejudice to the Inter-

[5] Additionally, some of the individual defendants, who were named in the same order to show cause, were required to testify, and their objections against self-incrimination were overruled *e.g.*, R. 167. This of course, would not be permitted in a criminal prosecution. *Griffin* v. *California*, 380 U.S. 609; *Gompers* v. *Bucks Stove & Range Co.*, 211 U.S. 418, 447-8.

national was particularly severe. Unlike Council 51, the International did not admit that it "conducted a strike in violation of the permanent injunction" (p. 7a *infra*). In defending against that allegation—which the court below recognized was all that the order to show cause charged (*ibid.*)—the International had no reason to put the movant to his proof with respect to the specific day on which one of its representatives first played any role in the strike, or when it received notice of the injunction. The show cause order fairly read made the sole issue as to liability whether the International had participated *at all*. Indeed, since the party who sought the contempt citation had the burden of proof on these elements of each violation, the failure of his able counsel to present such proof is the strongest possible evidence that no one thought it relevant *when* the International received notice and *when* its representatives participated in the strike.

Again, although the Trial Court found both petitioners "guilty of repeated separate contempts of this Court by their own direct violations and aiding and abetting and supporting others to violate this Court's injunction each day from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive" (p. 31a *infra*), it did not identify those violations. This failure to focus on the individual offenses and their elements was prejudicial to both petitioners, but particularly to the International, since he failed to consider when it received notice, and on what days it participated in the strike.

In sum, the proceedings in the Ohio courts have "denied to the [petitioners] 'due process of law'—using that term in its primary sense of an opportunity

to be heard and to defend its substantive right." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 678 (Brandeis, J.). This, we submit, is sufficient ground for review by this Court. And review is all the more essential because the problem which the present case exemplifies is of recurring importance—as we next show.

II. The Issue Posed in This Case Is of Recurring and General Importance.

"Certainly the history of contempt litigation, especially in regard to labor disputes, prescribes extreme care and insistence on the full indicia of due process in contempt cases." [6] Yet, as this case once again demonstrates, the lower courts, both state and federal, frequently fail to accord defendants elemental procedural rights. It is not that the courts consciously deny the constitutional rights of alleged contemnors; rather, the peculiar nature of the offense creates uncertainties which result in a failure to give effect in contempt proceedings to otherwise well understood requirements of due process. Definitive guidance as to the minimal constitutional requirements in contempt proceedings can be given only by this Court.

a) Statutes which declare an offense ordinarily define the unit of prosecution, or, less frequently, leave the question to statutory interpretation in light of the purpose of that particular statute, and more general principles, see *e.g., Bell* v. *Unted States,* 349 U.S. 81, 82-84. But statutes which authorize courts to punish for contempt of their lawful orders necessarily grant

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[6] *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostook R. Co.,* 380 F.2d 570, 582 (C.A.D.C.), cert. denied on other issues, 389 U.S. 327.

that power in general terms; they could not possibly define the unit of prosecution for all contempts since these are as varied as the subjects of injunctions. While we have no doubt that the courts may thus be granted the power to determine the unit of prosecution for contempts on an *ad hoc* basis, that power creates a special obligation to provide notice as to what the court will treat as the unit of prosecution in each case. Unless the pleading which initiates the contempt proceeding (such as the order to show cause) gives such notice, the defendant will remain in the dark until judgment, as to the elements of the offense and, in most instances, of the extent of his potential loss of liberty or property. This problem is of growing importance because an increasing number of regulatory statutes both state and federal are enforced by judicial orders either at the behest of an administrative agency, or some other public or private party.

b) We have shown thus far that basic due process principles require that an order to show cause (or other charge which initiates the proceeding) must specify the number and nature of the contempts charged. This Court's determination to resolve certain questions in *Codispoti* v. *Pennsylvania,* (#73-5615), cert. granted December 3, 1973, 42 U.S.L.Wk. 3333, may provide an additional basis for the same conclusion.

The petitioner in that case was convicted without a jury trial of numerous counts of contempt for incidents arising in a criminal trial at which he was a co-defendant. In support of the first question presented he argues, in part, that the right to a trial by jury for contempt depends on the aggregate sentence rather than the sentence on each count. (Petitioner's broader

claim on the same point is that related contempts create a continuing offense and may not therefore, be aggregated at all.) It is therefore possible—it would be inappropriate for us to opine that it is likely—that this Court, in accord with *United States* v. *Seale*, 461 F.2d 345, 353 (C.A.7), will decide that the States may constitutionally treat each incident as a separate contempt, but that the right to a jury depends on the possible total sentence, and not on the possible sentence for each count.[7] In that event, the precepts of *Baldwin* v. *New York*, 399 U.S. 66 (holding that it is the maximum possible penalty which determines the defendant's right to a jury trial), would strongly militate in favor of a holding that a Court which intends to aggregate several counts of contempt must so declare at the beginning of the proceeding, at least where there is a maximum possible sentence on each count.[8] Certainly, the orderly administration of justice demands that result. If the defendant's right to a jury trial is not determined until after trial, the unfortunate choice open at that point is between imposition of a sentence which the court believes is unjustly light, or granting the defendant a new trial before a jury. See the separate opinion of Justice Harlan in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 382.

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[7] Cf. *Taylor* v. *Hayes*, No. 73-473, in which certiorari was also granted on December 3, 1973, 42 U.S.L.Wk. 3333, where the petitioner contends that, in order to defeat his right to trial by jury, consecutive sentences on several counts of contempt were reduced to concurrent terms totalling six months.

[8] Where, as in *Cheff* v. *Schnackenberg*, 384 U.S. 373, and *Bloom* v. *Illinois*, 391 U.S. 194, there is no maximum punishment for any count of criminal contempt, it is necessary "to look to the penalty actually imposed" in determining the right to trial by jury. See *id.* at 211.

In sum, both the principles stated in this Court's decisions culminating in *Groppi* v. *Leslie, supra,* and the grant of certiorari in *Codispoti* mandate review of the Ohio Supreme Court's decision herein.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO
1973 TERM

To wit: September 6, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

SYLLABUS OF COURT

1. A trial court may permit a taxpayer and a citizen of a municipal corporation to intervene in a contempt action brought by the municipality against a union of city employees, where the court properly determines that such intervention is in the public interest or in furtherance of justice.

2. Notice which apprises the defendant of the nature of the charge against him so that he may prepare a defense is sufficient to comply with the requirements of R.C. 2705.03.

3. In a contempt proceeding, damages may properly be awarded to a municipal corporation as compensation for losses sustained as a result of the violation of an injunction against striking by a union of municipal employees.

4. Reduction in payroll expense of a municipal corporation, occasioned by a strike of municipal employees, may not be offset against damages sustained by the municipal corporation as the result of the strike.

Appellants, Cincinnati District Council 51, American Federation of State, County and Municipal Employees, AFL-CIO (hereinafter Council 51), and the American Fed-

eration of State, County, and Municipal Employees, AFL-CIO (hereinafter the International), were found in contempt of the Hamilton County Common Pleas Court for violation of a permanent injunction against striking and/or picketing against the city of Cincinnati, issued by that court on January 6, 1970. The strike was found by the Common Pleas Court to have lasted from January 4, 1970, through February 9, 1970. On September 14, 1971, the Common Pleas Court entered judgment finding appellants in contempt of court and fining them $37,000, $1,000 for each day of the strike. After crediting against this fine $7,800 (forfeiture of a security bond), $2,400 (fines previously paid by individuals), and $1,000 (court costs), the balance of the fine was determined to be $25,800. Of this $25,800 balance $13,000 was awarded to the city of Cincinnati as damages, and the remainder was awarded to Hamilton County as a "criminal penalty."

Further facts as necessary to the decision of this case are discussed in the opinion.

The Court of Appeals affirmed the judgment of the trial court. The cause is before this court pursuant to the allowance of a motion to certify the record.

O'NEILL, Chief Justice:—This appeal raises serious and difficult questions regarding the powers of courts to punish for contempt of their orders.

It is noted at the outset that both a temporary restraining order issued on January 4, 1970, and the permanent injunction issued on January 6, 1970, enjoined Council 51 ". . . from carrying on a strike and/or picketing against the city of Cincinnati, Ohio." It is not here contended that the injunction was unlawfully issued, and it is conceded that by striking Council 51 acted in contempt of the injunction. Appellants, however, assert ten propositions of law, in essence challenging the nature and extent of punishment of Council 51 and the International, and the intervention by the intervenor-defendant, appellee herein.

In particular, appellants assert:

(1) That they were denied due process of law by not being put on notice "at any time prior to judgment" that they were being tried for multiple contempts;

(2) That the denial of a motion for specification of the charges is an abuse of discretion in light of the finding of multiple contempts;

(3) That a judgment finding appellants in contempt of the permanent injunction on January 4 and 5 is unsupportable on its face;

(4) That the judgment is without the requisite evidentiary support;

(5) That the court's authority to punish for indirect contempt is limited by R. C. 2705.05 and 2727.12, which sections do not authorize an award of damages;

(6) That since a jury trial may not be had in a contempt proceeding, the awarding of a damage judgment in such a proceeding deprives the appellants of the right to a jury trial in an action for damages in violation of Section 5 of Article I of the Ohio Constitution;

(7) That it is error to permit a person to intervene pursuant to R. C. 733,581 for the purpose of initiating new contempt proceedings where an injunction action instituted by a municipal corporation has been concluded by the entry of final judgment;

(8) That it is improper to assess a fine of $1,000 for each contempt, since R. C. 2705.05 provides for a maximum fine of $500;

(9) That agreement by the city to waive its right to have acts in violation of the injunction adjudged to be in contempt constitutes a defense to a subsequent charge of contempt;

(10) That the proper measure of damages is the actual monetary loss sustained and that since the city reaped a monetary gain, the judgment awarding damages can not stand.

Propositions (1) and (2) relate to the question of whether appellants were adequately notified of the nature of the proceedings against them and will be treated together. Propositions (3) and (4) question the degree of evidence necessary to support the judgment below and will be treated together. Propositions (5), (6), (8) and (10) relating to the award of damages and the size of the fine, will also be treated together. The remaining propositions will be treated separately.

I. Proposition of law (7).

R. C. 733.581 provides in pertinent part:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

That statute has not been previously construed by this court. It is apparent, however, that the granting or withholding of permission to intervene is within the sound discretion of the trial court.

Unless the trial court is shown to have abused that discretion, this court will not disturb its decision.

The record indicates that the application to intervene was filed on February 6, 1970, subsequent to declarations by the officers of the city expressing an intention to dismiss the contempt proceedings arising from violations of the permanent injunction. The trial court conducted a hearing on the application to intervene, during which counsel for the city protested the intervention and expressed the city government's desire to terminate the proceedings. They argued, in essence, that it was the responsibility of the public officials to determine what course of action was in the best public interest, and that "* * * at best, Mr. Goldberg is here to question the handling of this case by a solicitor."

That argument, which challenges the standing of a taxpayer to question discretionary decisions of government officials by intervention in litigation, is relied upon by appellants in this court. The appellee argued that the government's position failed to protect the interests of the people of Cincinnati. He contended that to permit the contempt of appellants to go unpunished would encourage disrespect for orders of the courts. Further, he contended that the city had suffered substantial damage as a result of the strike, which would not be recompensed should the contempt proceeding be dismissed.

The argument of counsel for the city clearly fails to meet the contentions raised by the appellee. While it may be conceded that municipal officials are invested with broad discretion to decide matters of public interest, this discretion is not entirely unchecked. The General Assembly has seen fit to provide certain procedures through which taxpayers of a municipality may question the government's decisions in matters of public interest. One of these procedures is provided in R. C. 733.581, which permits taxpayers to present their views on public questions to the courts in actions in which the municipality is a party.

It is difficult to conjure matters of greater public interest than the preservation of city services or the maintenance of respect for the lawful orders of the courts. Where litigation touches both matters, it is not an abuse of discretion to permit intervention by a taxpayer.

II. Propositions of law (1) and (2).

Appellants argue that they were denied due process of law in that they were not notified that the proceeding against them involved multiple contempts. In this connection, appellants further complain that "* * * the denial of a motion for specification of the charges is an abuse of discretion * * *."

Proceedings in contempt are *sui generis* in the law. They bear some resemblance to suits in equity, to criminal proceedings and to ordinary civil actions; but they are none of these. Contempt proceedings are means through which the courts enforce their lawful orders. The power to punish for contempt is said to be inherent in the courts and to exist independently from express constitutional provision or legislative enactment. See State v. Local Union 5760 (1961), 172 Ohio St. 75, 173 N.E.2d 331, 47 LRRM 2921. The nature of contempt proceedings can vary greatly. Some are summary; others involve notice and hearings. Generally, there is no jury trial; but where a long term of imprisonment is involved a jury trial may be a requisite.

What constitutes due process in a contempt proceeding depends to a large extent upon whether the contempt is direct or indirect, and whether it is civil or criminal. The distinction between these alternatives is far from clear. It is said that direct contempt takes place in the presence of the court, and indirect contempt is all other contempt. Yet, in Local Union 5760, supra, this court held that "interference with a court officer in his attempt to execute court process constitutes direct contempt in the constructive presence of the court," and that "courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court." The court arrived at this holding despite a statute which provided that "Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer" was indirect contempt.

The distinction between direct and indirect contempt is important. Both procedural and substantive rights are affected. Direct contempt is generally dealt with summarily, whereas it has been stated that statutory procedures must be followed in indirect contempt proceedings. See State v. Local Union 5760, supra; In the Matter of Lands (1946), 146 Ohio St. 589, 67 N.E.2d 433.

The present appeal involves the type of proceeding traditionally viewed as indirect contempt. The contempt took place out of the presence of the court. Furthermore, there was no interference with an officer of the court in his attempt to execute court process, viz., there was no direct contempt in the constructive presence of the court.

R. C. 2705.03 sets forth the procedure which must be followed in indirect contempt proceedings. That section, *inter alia*, provides that "a charge in writing shall be filed with the clerk of court." Appellants do not deny that a charge was filed, but they contend that neither the show cause order nor the affidavit in support thereof apprised them that multiple contempts were charged and that they were thereby denied due process of law.

The function of written notice is to apprise the defendant of the charges against him so that he is able to prepare his defense. See Foutty v. Maxwell (1962), 174 Ohio St. 35, 186 N.E.2d 623. The show cause order here involved apprised the appellants of both the nature of the proceeding (civil contempt) and the reason for the proceeding (violation of the permanent injunction previously entered). That the order did not mention that 37 contempts would be punished did not work prejudice against the appellant union. Each of these separate contempts was the same as the others, i.e., that the appellants conducted a strike in violation of the permanent injunction. Furthermore, appellants were certainly aware of the number of days they remained on strike.

Appellants strenuously assert that they were prejudiced by lack of notice. Nowhere, however, do they indicate the precise nature of this prejudice. The most that appellants assert is that "appellants, not having been advised that they were charged with thirty-seven separate contempts, made no effort to defend against such a charge." This

argument is sound so far as it goes, but it does not go far enough. No evidence was introduced or argument advanced to show how appellants would have defended differently had they been fully aware that 37 contempts were involved. Although appellants argue that prejudice could have arisen, they totally fail to demonstrate that prejudice actually arose in this case.

The motion which appellants here label "a motion for specification" was properly overruled for these same reasons. The motion was first made orally at the commencement of trial: "Move to dismiss on the ground that the affidavit of the motion for order to show cause and the order to show cause itself does not apprise the parties affected with any information as to the act which they are alleged to have committed which is said to be in contempt of the court's permanent injunction in this case." As noted previously, the show cause order advised the appellants that they were charged with violation of a permanent injunction which enjoined appellants "* * * from carrying on a strike and/or picketing against the city of Cincinnati." Such notice was clearly sufficient to apprise the appellants of the charge against them and to enable them to prepare a defense.

III. Propositions of law (3) and (4).

Appellants argue that the judgment of the trial court finding them in contempt on January 4 and 5 was erroneous on its face, since the permanent injunction was not issued until January 6, 1970. They contend further that the entire judgment of the trial court lacks the requisite evidentiary support.

Since the show cause order spoke only of the "permanent injunction" and the "permanent injunction" was not issued until January 6, 1970, it was improper to fine appellants for acts occurring on January 4 and 5 of 1970. That a temporary restraining order had been issued on January 4, 1970,

does not change this result as violation of that restraining order was not alleged in the show cause order. Furthermore, the record reveals that appeallant Council 51 had already been fined for violation of the temporary restraining order in a proceeding on January 7, 1970, thus rendering that issue *res judicata* as to Council 51.

Appellants' argument that the trial court's judgment lacked requisite evidentiary support is directed primarily to the finding against the appellant International. Indeed, counsel for the appellants admits in its brief to this court that "There is no question but that Council 51 supported the strike from beginning to end."

Appellants stress that the judgment herein must be supported by "clear, positive, and convincing" evidence, citing Loney v. Hall (1917), 8 Ohio App. 154. However, that case also proposed that "The judgment of a trial judge who has passed upon the sufficiency and weight of the evidence will not be disturbed, where the evidence is such that different minds might reach different conclusions." Furthermore, it is well settled that this court does not weigh evidence. E.g., State v. Wilson (1972), 30 Ohio St.2d 199, 283, N.E.2d 632. This court, however, will examine the record to determine whether the requisite degree of proof has been met. Cincinnati Motor Transp. Assn. v. Lincoln Hts. (1971), 25 Ohio St.2d 203, 206, 267 N.E.2d 797.

Although this court is not bound by Loney, the degree of proof required by that case has been met herein with respect to the judgment against the International. The record reveals that the president of the International was notified within 24 hours after the strike was called. Thereafter, the International sent three representatives to Cincinnati. These representatives attended meetings with city representatives, wherein the city was advised that "the men would not return to work until an agreement satis-

factory to the Unions had been reached." The director of Council 51 testified that he contacted the International "from time to time" as the strike was continuing, and that the president of the International advised him that money would be sent to the strikers. It was also testified that the International did, in fact, send some $20,000 to Council 51 for "hardship cases." Testimony of a newspaper reporter present at many of the union meetings revealed that at least one of the International representatives made public statements in support of the strike, and that "every union leader I heard speak to a large body of people, publicly supported the strike."

From the foregoing testimony and from the record as a whole, a majority of this court is of the view that the trial court correctly found that the International aided and encouraged the strike in violation of the permanent injunction.

IV. Propositions of law (5), (6), (8) and (10).

Appellants contend that the award of damages herein was unlawful and unconstitutional. They also contend that since the measure of damages is actual monetary loss and that since the city saved a substantial sum in payroll, the city suffered no actual monetary loss.

The constitutional objection to the award of damages arises under Section 5 of Article I of the Ohio Constitution, which provides:

> "The right to trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Appellants argue that "since a jury trial may not be had in a contempt proceedings, the awarding of a damage judgment in such a proceeding deprives the defendant of his right to a jury trial in an action for damages in violation of Article I, Sec. 5 of the Ohio Constitution."

That argument is untenable. It is well settled that "* * * conduct can amount to both civil and criminal contempt," United States v. United Mine Workers of America, (1947), 330 U.S. 258, 299, 19 LRRM 2346, 2361, and that both aspects may be dealt with in the same proceeding. See, also, Cromaglass Corp. v. Ferm (M.D. Pa. 1972), 174 U.S.P.Q. 469, 344 F.Supp. 924. It is also well settled that "judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, *and to compensate the complainant for losses sustained*" United Mine Workers, *supra, at 303,* 19 LRRM at 2363. See, also, N.L.R.B. v. San Francisco Typographical Union (C.A. 9, 1972), 465 F.2d 53, 80 LRRM 3076; Windham Bank v. Tomaszczyk (1971), 27 Ohio St.2d 55, 271 N.E.2d 815; and Dept. of Pub. Health v. Cumberland Cattle Co., 72 Mass. 1031 (1972), 282 N.E.2d 895.

The present case involves both civil and criminal aspects. The award of damages to the city of Cincinnati is the civil aspect, and such award is proper in a contempt proceeding to compensate for losses. Furthermore, it is clear that Section 5 of Article I "* * * only guarantees the right of trial by jury in those cases where it existed previous to its adoption." Belding v. State, ex. rel. Heifner (1929), 121 Ohio St. 393, 169 N.E. 301. There exists no right to trial by jury in contempt proceedings, except perhaps where lengthy jail sentences are likely. Such is not the case here.

Appellants assert that the award of damages was unlawful as exceeding the court's authority to punish for contempt under R. C. 2705.05 and R. C. 2727.12. Similarly, they contend that it was improper to assess a fine of $1,000 for each contempt since the maximum fine allowed under R. C. 2705.05 is $500.

Assuming, *arguendo*, that the General Assembly may limit the power of the courts to punish for contempt of their lawful orders, it is apparent that the fines in the present case are within the limits of R. C. 2705.05. The $500 maximum fine under that statute applies to a single contempt by a single contemner. Here there are two contemners, Council 51 and the International; thus, a $1,000 fine against both for each day of the strike would be within the statutory limit.* It is, however, highly doubtful that the General Assembly may properly limit the power of a court to punish for contempt. Although it is conceded that the General Assembly may prescribe procedure in indirect contempt cases, the power to punish for contempt has traditionally been regarded as inherent in the courts and not subject to legislative control. See State v. Local Union 5760, supra (172 Ohio St. 75, 47 LRRM 2921). The Courts of Common Pleas are established by Section 1 of Article IV of the Ohio Constitution not by the General Assembly, and, hence, are coequal branches of the government. Those courts are vested with the judicial power of the state, which includes the power to enforce orders by contempt proceedings.

Respecting the award of a portion of their fines assessed herein as damages to the city of Cincinnati, appellants argue that R. C. 2727.12 speaks only of "restitution" to the injured party, and that damages are not restitution. While at common law restitution denoted return of a specific thing or condition, modern usage of that term includes restoration to its rightful owner and also compensation for

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* It is well settled that separate fines may be assessed for each day in which a court's order is violated. New Jersey v. New York (1933), 290 U.S. 237; Madden v. Grain Elevator, Flour & Feed Mill Wkrs. (C.A. 7, 1964), 334 F.2d 1014, 56 LRRM 2728. Meredith v. Fair (C.A. 5, 1962), 313 F.2d 532; Meredith v. Fair (C.A. 5, 1962), 313 F.2d 534; Commonwealth v. Hudson (1943), 315 Mass. 335, 52 N.E.2d 566.

loss or injury caused to another. 66 American Jurisprudence 2d 942, Restitution and Implied Contracts, Section 1. In any event, as previously discussed, compensation of the injured party has traditionally been a function of civil contempt proceedings. It was, therefore, proper for the trial court to award damages to the city of Cincinnati to compensate for losses sustained during the strike.

Appellants contend that the city sustained no loss as a result of the strike, for the reason that it saved substantial sums in payroll expenses. This argument is wholly untenable. Obviously, the city sustained a substantial loss of vital services as a result of the strike. Streets were left unrepaired, garbage remained uncollected and sewage was untreated. Millions of gallons of raw sewage were poured into the Ohio River. Although the precise cost of this loss of services can never be accurately determined, the injury occasioned thereby was no doubt substantial.

In any event, the record reveals that the excess cost of using supervisory personnel to operate the waterworks was $63,000, not including fees of $20,000 paid to outside contractors who provided services normally performed by city employees. This alone is sufficient to justify the award of $13,000 in compensation to the city.

V. Proposition of law (9).

Finally, appellants argue that by agreement or by conduct the city officials waived their right to prosecute for contempt and that such waiver operates as a defense to this proceeding.

The Court of Appeals found that this argument is not supported by the record. Assuming, *arguendo*, that it is so supported, however, adoption of appellants' view would nullify R. C. 733.581. That statute, as previously discussed, operates as a check upon the discretion of city officials when matters of public interest are in litigation. This check

would be a farce should the conduct of city officials be held a defense to actions involving questions of public interest.

In support of their argument, appellants quote from 17 Corpus Juris Secundum, 103, Contempt, Section 39, that:

> "As a rule, the fact that the contempt charged is the result of the direct or implied advice or consent of complainant is a sufficient justification therefor * * *."

Appellants, however, have not quoted far enough. That section continues:

> "* * * although it has been held that an arrangement between the parties or their attorneys is not an excuse for disobedience of a court order. It has been further held that complainant's consent to the violation of a court order must be of a decided character to be effective."

Tested by those principles, it is apparent that the actions of the city officials or any agreement made by them does not operate as a defense to the present action.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in all respects, except that it is reversed with respect to the finding that appellants were in contempt of the permanent injunction on January 4 and January 5, 1970.

Judgment affirmed in part and reversed in part.

HERBERT, STERN, and PAUL W. BROWN, Justices, concur.

CORRIGAN and CELEBREZZE, Justices, dissent.

WILLIAM B. BROWN, Justice, concurs in paragraphs one and two of the syllabus but dissents from paragraphs three and four of the syllabus and from the judgment.

DISSENTING OPINIONS

CORRIGAN, Justice, dissenting:—As the majority suggest in their opinion, this appeal raises serious questions. They further point to difficult questions. They fail to find simple answers to at least one of the difficulties that seems to be troublesome to them.

R. C. 733.581 provides, in pertinent part:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

It is noted in the majority opinion that this statute has not been previously construed. They add that "It is apparent, however, that the granting or withholding of permission to intervene is within the sound discretion of the trial court."

So that the key question obviously is: Does a contempt proceeding constitute a civil action or proceeding under R. C. 733.581? The case authorities answer negatively.

While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government proceedings to punish such offenses have been regarded as *sui generis* and not criminal prosecutions within the Sixth Amendment to the United States Constitution, or common understanding.

A contempt proceeding is *sui generis*. Blackmer v. United States (1932), 284 U.S. 421; Blankenburg v. Commonwealth (1930), 272 Mass. 25, 172 N.E. 209.

Contempt proceedings are *sui generis*, being neither "civil actions" nor "criminal prosecutions" within ordinary meaning of terms. Bowles v. United States (C. A. Md. 1931), 50 F.2d 848, 850.

Sui generis, translated, means: Of its own kind; peculiar to itself.

Ohio lines up with the United States Supreme Court in holding that a contempt proceeding is a special proceeding. Iron Moulders Union v. I. & E. Greenwald Co. (1906), 4 N. P. (N. S.), 161, 1964.

A contempt proceeding is not a civil action but a special statutory proceeding. See Niemes v. Niemes (1917), 97 Ohio St. 145.

There is a catholicity of authority on the same point from many jurisdictions.

The majority agree that such proceedings are sui generis. It then follows inescapably that the trial court had no authority under R. C. 733.581 to grant the application to intervene because the contempt proceeding was not a civil action or proceeding and the trial court abused its discretion in granting such motion to intervene.

Accordingly, for this reason alone, the judgment of the Court of Appeals should be reversed.

CELEBREZZE, Justice, concurs in the foregoing dissenting opinion.

WILLIAM B. BROWN, Justice, dissenting:—I dissent from the judgment and from the last two paragraphs of the syllabus.

The court abused its discretion in levying against local Council 51 and the parent union fines totalling $37,000 ($1,000 for each of 37 days).

For the violation of an injunction which amounts to contempt, the violators can be fined pursuant to R. C. 2705.05 or R. C. 2727.12, or both. Hayes v. Hayes (1919), 11 Ohio App. 10. R. C. 2705 provides:

> "Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear

any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both."

Since there are two defendants who admitted to violating the injunction, fines totalling $1,000 could have been levied. R. C. 2727.12, as will be shown hereinafter, does not apply. So the levy of $37,000 constituted an abuse of discretion.

The majority attempts to justify the fines on four alternate grounds: (1) that each day the strikers were out of work constituted a separate violation of the court order; (2) that the power of the court to impose punishment for contempt cannot be limited by the General Assembly; (3) that civil as well as criminal contempt is involved; and (4) that R. C. 2727.12, allowing restitution for the violation of an injunction, applies here.

As to the 37 violations, the injunction granted January 6, 1970, enjoined the defendants "from carrying on a strike and/or picketing against the city of Cincinnati, Ohio." When the workers did not go to work the following day, they violated the injunction because they were "carrying on a strike." They remained in violation of the injunction until they returned to work. So, there was a violation by the local union and the parent union; and, according to R. C. 2705.05, they were subject to a total of $1,000 in fines. The majority assumes that there was a separate violation of the injunction for each day the workers were not at work. Why not compute a violation for each hour the workers were not working? How is one day decided upon as the period for which a new violation is computed? There is no indication in the statute nor in the Ohio case law to support this novel interpretation.

Secondly, the majority doubts that contempt power can be limited by the General Assembly. As regards direct contempt, the court's power cannot be limited. State v. Local Union 5760 (1961), 172 Ohio St. 75, 82, 47 LRRM 2921. In the instant case, however, there is indirect contempt.

Indirect contempt involves actions committed outside the presence of the court, tending to obstruct the due and orderly administration of justice. In the Matter of Lands (1946), 146 Ohio St. 589, 595. The activity in the instant case did not occur in the presence of the court; nor did it fall within the exceptions of Hale v. State (1896), 55 Ohio St. 210, where a witness under subpoena to testify was removed outside of the court's process, or of State v. Local Union 5760 (1961), 172 Ohio St. 75, 47 LRRM 2926, where a sheriff was prevented from serving a writ of replevin. Indirect contempt is involved here, so the statutory provisions for levying fines must be followed.

The invocation of the court's summary power for direct contempt is an awesome power that the court must be cautious in using: it should be restricted to activity that threatens the integrity or the very functioning of the judicial process. The illegal activity here admittedly was contemptuous; but it was not of a nature that would justify the court's use of its summary and arbitrary power. I see no reason to extend that power to our situation.

Thirdly, civil contempt is that judicial power used to bring about compliance with lawful court orders. Paragraph three of the syllabus in Windham Bank v. Tomaszczyk (1971), 27 Ohio St.2d 55, provides:

> "The purpose of sanction in a case of civil contempt is to compel the contemnor to comply with lawful orders of a court * * *."

The trial in the instant case was held at a time long after the strike was settled. There was no possibility of com-

pelling the contemnor to comply, so there could be no civil contempt. Criminal contempt alone is involved here.

Both Windham Bank v. Tomaszczyk supra, and United States v. United Mine Workers of America (1947), 330 U.S. 258, 19 LRRM 2346, are cited as support for the dual, criminal and civil, aspects of this case. Those two cases are readily distinguishable. In those cases, the contemptuous activity continued until the date of trial, and the court could have imposed the sanctions of civil contempt to effect compliance; in the instant case the strike was settled, and there was no purpose for using civil contempt.

Lastly, it is claimed that the fines could be justified under R. C. 2727.12, which provides:

> "Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, for the use of the county, *make immediate restitution to the party injured,* and give further security to obey the injunction or restraining order. In default thereof, said party may be committed to close custody until he complies with such requirement, or is otherwise discharged." (Emphasis added).

The Restatement of the Law, Restitution, provides, at page 12:

> "Section 1.
>
> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."

The connection of restitution and unjust enrichment is explained later in the restatement at pages 595-96, as:

> "Actions for restitution have for their primary purpose taking from the defendant and restoring to the

plaintiff something to which the plaintiff is entitled, or if this is not done, causing the defendant to pay the plaintiff an amount which will restore the plaintiff to the position in which he was before the defendant received the benefit."

In this case, the unions have not received a windfall: they have not been enriched at all; in fact they are poorer, as a result of the strike.

Therefore, the amount levied in fines should have been limited to a total of $1,000.

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: July 18, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

Mandate

To the Honorable Common Pleas Court within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed in all respects except that it is reversed with respect to the finding that appellants were in contempt of the permanent

injunction on January 4 and January 5, 1970, for the reasons set forth in the opinion rendered herein.

THOMAS L. STARTZMAN,
Clerk

RECORD OF COSTS

Docket Fee, $20.00; Paid by James C. Paradise

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM

To wit: September 6, 1973

No. 72-697

THE STATE OF OHIO, CITY OF COLUMBUS.
CITY OF CINCINNATI, *Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Appellants*; ET AL., *Appellee.*

Rehearing

It is ordered by the court that rehearing in this case is denied.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. 11864

July 10, 1973

CITY OF CINCINNATI, *Plaintiff-Appellee,*

vs.

CINCINNATI DISTRICT COUNCIL NO. 51, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Defendants-Appellants.*

Decision

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the assignments of error, the briefs and arguments of counsel for the defendants-appellants and counsel for the intervenor-appellee.

Upon consideration thereof, the Court finds that the first assignment, in both its branches, is not well taken. Uncontrovertedly, an illegal strike by public employees had been enjoined by the court below. By stipulation set forth in the record, District Council 51 and the affiliated local unions maintained a strike fund and the International Union contributed funds thereto. It is clear that such financial support encouraged, aided and abetted the illegal actions of the strikers and made it possible for them to prolong the strike. Deeds and words of agents and officers of the labor organizations similarly constituted approbation of the contumacious acts manifest from the record. The strike was enjoined from its beginning to the date

upon which the strikers resumed work for the City of Cincinnati, and a court has the power to impose repeated penalties for multiple contempts evidenced by failure to obey its order over a period of time.

Therefore, the court did not err in finding that each day constituted a contempt of an order of court, that there were thirty-seven separate violations, that is, contempts, such finding being fully supported by the record and, in the premises, did not err prejudicially in denying motions of appellants for specifications. There was no denial of due process of law manifest from the record either in the findings or the assessment of the fine.

Further, the Court finds that the second assignment of error is not well taken. From the record, it is clear that the fines imposed by the court do not exceed the maximums established either by Section 2705.05 or Section 2727.12, Ohio Revised Code, since the contemnors were penalized separately for separate but continuing acts of contempt.

Further, the Court finds that the third assignment of error is not well taken. The intervenor-appellee adduced substantial evidence of probative value to establish pecuniary damage to the City of Cincinnati proximately caused by the illegal strike and contumacious acts of defendants-appellants. The proceedings below related to civil contempts and the court was empowered, in the totality of circumstances, to award damages, that is, to compensate the entity which was injured by the violation of the order of court, since a court's power in civil contempt proceedings is to be determined by the requirements of full remedial relief. In the case at bar, the award is in harmony with the manifest weight of the evidence.

Further, the Court finds that the fourth assignment of error is not well taken. The court did not err in permitting the intervenor to initiate and pursue contempt proceedings and seek damages for the City of Cincinnati. By

statute, (Section 733.581 Ohio Revised Code), it is provided:

> "In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be furthered."

In this connection, we are constrained to note that the solicitor of the City of Cincinnati failed to appear upon call of this matter before this Court to argue on behalf of the City. The brief filed by the solicitor refers to a "memorandum of settlement" entered into between the labor organizations and the City immediately prior to the return to work of the strikers. It is the stated position of the solicitor that pursuant to such "settlement" be entered into a joint motion with defendants-appellants seeking a modification of the order on "the contempt matters" and for a dismissal of the entire matter including dissolution of the injunction. No where in such brief does the solicitor respond to the assignments of error and this Court considers such brief to be frivolous.

It is difficult to conceive of a matter of more importance to the public than a strike by employees of a city and the cessation of vital services thereby occasioned. The City, through its solicitor, sought and obtained court orders enjoining the strike here involved. The City thereafter brought and supported charges of contempt of such orders. In Windham Bank v. Tomaszczyk, 27 Ohio St. 2d 55, the Supreme Court has stated (syllabus two):

> "The purpose of contempt proceedings is to secure the dignity of the courts and the uninterrupted and unimpeded administration of justice."

It is manifest to us that permitting the intervenor to act was to protect the public interest and to further justice.

Further, the fifth assignment of error is not well taken because it is not supported by the record. Additionally, acts which are contumacious cannot be expiated by agreements or arrangements between the parties or their attorneys. They cannot, themselves, excuse disobedience of a court order.

Further, the sixth assignment of error is not well taken because the finding of the court is not contrary to the manifest weight of the evidence and for reasons stated hereinabove.

Further, the seventh assignment of error is not well taken because the finding of the court that the International Union was in contempt on each day that the strike continued is supported by substantial and probative evidence.

Further, the eighth assignment of error is not well taken because the findings concerning damages are supported by substantial and probative evidence and for the reasons given in our ruling upon the third assignment of error.

Further, the ninth assignment of error is not well taken for the reasons given in our ruling upon the first and fourth assignments of error as they apply to defendants-appellants' contention that the court erred in refusing to dismiss the action and to dissolve the injunction.

Therefore, the judgments and orders of the Court of Common Pleas of Hamilton County, Ohio, are affirmed.
Hess, P. J., Young and Shannon, J. J.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. 11864

Judgment Entry

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by his counsel, excepts. Entered

July 10, 1972
MINUTE 348

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-244947

CITY OF CINCINNATI, *Plaintiff*,

vs.

CINCINNATI DISTRICT COUNCIL No. 51, AMERICAN FEDERATION ETC. ET AL., *Defendants*.

Decision of the Court

Morrissey, J.
July 28, 1971

The Court: Counsel, in regard to the supplemental motion on grounds for reopening the case, it's hereby denied.

In regard to the contemptuous behavior of the striking organizations, evidence having been produced at prior date indicating the strike to be 37 days, the Court hereby levies a fine of $1,000 for each day of the strike equal to the sum of $37,000.

Mr. Paradise: I'm sorry, your Honor, I don't quite understand. I didn't hear exactly what you ruled. $37,000 against whom?

The Court: Against the union organizations, not the individuals.

Mr. Paradise: Total?

The Court: Yes, as a whole.

Mr. Paradise: Is that distributed among each of them?

The Court: Pro rata.

Mr. Paradise: Pro rata?

The Court: On a share basis as they agreed.

Mr. Goldman: Your Honor, are you disposing of the civil contempt proceedings on the preceding hearing as to the damages suffered by the City as a result of the strike?

The Court: In that regard on the motion, Mr. Goldman, Mr. Paradise, Mr. Kircher, the Court is going to take into consideration the $7,800 bond, and it will be forfeited and credited against the $37,000. The $2,400 in fines that had previously been paid by the individuals will be credited against the $37,000, and the court costs that are due and owing in this case, approximately but not in excess of $1,000, will be credited against the $37,000. Now, if possible, the balance in round figures, about $25,800, if possible, will be split between the City of Cincinnati and the County of Hamilton, to be the sum equal to the amount applicable to the City as damages, and the balance to be applicable to the County by way of fines.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-244947

Judgment Entry

This matter is before the Court following trial on an order to show cause why the defendants and certain additional persons and organizations should not be held in contempt of this Court's order of permanent injunction entered in this case on January 6, 1970.

The principal action was originally brought by the City of Cincinnati against the defendant unions who had threatened a strike against the City and their officers and agents. A temporary restraining order was issued by another Judge of this Court on the 4th day of January, 1970. It was completely ignored and flagrantly violated by the defendant unions and their principal officers and agents. Apparently no effort was made to require those guilty of such violations to answer for their contempt of that temporary order.

Thereupon the case was tried on the merits and at the conclusion of such trial on the 6th day of January, 1970,

this Court entered its judgment and permanent injunction enjoining and restraining defendants from carrying on a strike or picketing against the City of Cincinnati.

The ink was hardly dry on this Court's permanent injunction when a number of the defendants with full knowledge of it proceeded to violate it. The strike continued unabated. Certain of the defendants were brought before this Court for their contempt, and as punishment fines and jail sentences were imposed. Some of the jail sentences were suspended; others were partially served and those serving jail terms were permitted to leave their confinement before they had fully served their sentences at the request of the City in the hope that they would help bring the strike to a speedy close. However, the strike went on and the defendant unions and certain of the other defendants continued to violate this Court's injunction by continuing, encouraging, aiding and abetting the strike.

With full knowledge of this Court's permanent injunction the International Union, a parent of the defendant unions, American Federation of State, County and Municipal Employees, AFL-CIO, in Washington, D.C. sent at least two of its representatives, Jesse Epps and Robert Brindza to Cincinnati to assist the defendant local unions and the defendant Cincinnati District Council No. 51 in carrying on the strike, and contributed twenty thousand dollars ($20,000.00) to District Council No. 51 as financial support for the strike. The defendant local unions and Cincinnati District Council No. 51 also contributed varying amounts to give financial support for the strike.

The strike continued and this Court's injunction continued to be repeatedly violated until the 9th day of February, 1970, although the date on which the City and the unions entered into an agreement to settle the strike was the 7th day of February 1970. The fact that pressure was brought to bear on the City by the illegality of the strike and violation of this Court's order was ignored by the

City, and the City asked to have the earlier contempt proceedings herein dismissed and previous punishment imposed remitted.

In the meantime, however, a taxpayer, citizen and resident of the City, filed an application to intervene herein under the provisions of section 733.581 of the Revised Code on the ground that this matter involved the public interest and that such intervention would better serve the public interest and further justice. This Court believing that the public interest was very much involved in this case, and that it would be better served and justice furthered by such intervention, granted such application to intervene. The Court refused to dismiss the earlier contempt proceedings, or at that time to remit the penalties imposed.

Upon the motion of the intervenor, this Court issued an order to show cause on the defendants and on the parent union in Washington, D.C., and on its representatives, Epps and Brindza, why they should not be held in contempt of this Court's order of injunction and why they should not respond in damages to the City for damages caused the City by their violations of this Court's order. Such order was duly served on the defendants and on said parent union and said Epps and Brindza, and they all were given adequate time to answer and prepare for trial.

Upon the trial it was amply demonstrated that the defendant local unions, Cincinnati District Council No. 51, and the parent union as well as its representatives, and many of the individual defendants were all guilty of repeated contempts of this Court's injunction.

However, at the suggestion of counsel for the intervenor, this Court in the exercise of its prerogative to show mercy even when mercy may be undeserved, dismissed the charges against the individual union members. This Court did not dismiss the charges against the local unions, Cincinnati District Council No. 51 and the parent union, and Messrs.

Epps, Brindza, Van Hagen, Powell and Inman. The Court, however, wishes to emphasize to the individual union officials and representatives who violated its injunction, that any further or similar violation will not be tolerated, and that mercy will not be in order if there is a repetition of similar contumacy.

The individuals, Epps, Brindza, Van Hagen, Powell and Inman, because of their contumacious conduct, in some cases quite aggravated, really deserve no mercy. Nevertheless the Court will show them mercy and hereby remits the balance of the unserved time of the earlier jail sentences imposed on any of Van Hagen, Powell and Inman, and also the suspended jail sentences imposed earlier on James Switzer, Thomas Rothert, Gerald Ellison, Clifford R. Sharp, Ivan Calhoun, Robert Buck and William Bruger. Fines previously assessed against any defendants and not paid are hereby remitted and are not ordered to be paid.

The Court finds each of the defendant local unions guilty of contempt of this Court because of their repeated violations of this Court's injunction, but because of the action taken herein against Cincinnati District Council No. 51 and the parent union in Washington, D.C., and in the hope that the local unions will in the future not be misled into violating the law and court orders, no penalties are assessed against such local unions.

As to the defendant Cincinnati District Council No. 51, American Federation of State, County and Municipal Employees, AFL-CIO, and the parent union American Federation of State, County and Municipal Employees, AFL-CIO Washington, D.C., the Court finds each of them guilty of repeated separate contempts of this Court by their own direct violations and aiding and abetting and supporting others to violate this Court's injunction each day from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive, and as punishment therefor this Court hereby assesses a fine plus damages for a total of $1,000.00 per

day for each day said strike continued from the 4th day of January, 1970, to the 9th day of February, 1970, inclusive, being 37 days, each day being deemed a separate contempt for said District Council and for said International Union.

The Clerk of this Court is holding as security $7800.00 in cash from funds otherwise payable to said Cincinnati District Council No. 51. Said Clerk is hereby ordered to pay said sum of $7800.00 into the appropriate account for collected fines.

Coming now to consider the question of damages the Court finds that the City suffered very substantial damages because of the charged defendants' and others' continuancy. In some instances because of the difficulty of fixing a dollar amount for damages suffered from failure to collect garbage and other waste, causing streets to remain in disrepair, failure to treat sewage, and other instances of grave damage, no dollar amount was established with requisite certainty. It was shown that the damages for loss of services suffered by the City was at least $480,000.00 in actual dollar amount; that the Water Works was put to extra expenses in excess of $60,000.00; that the City motor vehicle inspection lane lost revenue as did City parking meters. Were the Court to assess damages in an amount that would even approach the damages actually proved with requisite certainty, not to speak of the much larger damages the amount of which was too difficult to prove with requisite certainty, it might very well bankrupt the individuals and labor organizations involved. This the Court wishes to avoid doing because the individuals may have "learned their lesson," and because those organizations, if they conducted themselves within the law, could perform valuable services to their members and to the community.

It Is Hereby Ordered that judgment be entered on said verdict in favor of plaintiff, City of Cincinnati for damages suffered by the City, and enters said judgment in its favor

against said parent union, American Federation of State, County and Municipal Employees, AFL-CIO, Washington, D.C., and the Cincinnati District Council No. 51, of the American Federation of State, County and Municipal Employees, AFL-CIO, jointly and severally, in the sum of $13,000.00.

Counsel for the intervenor taxpayer having requested that no award of attorneys' fees be made to him, his request will be respected and no award of attorneys' fees will be made.

Costs of these proceedings at defendants' costs.

RECAPITULATION:

Strike 37 days at $1,000.00 a day		$37,000.00
Credit:		
Security bond	$7,800.00	
Fines pre-paid	2,400.00	
Court costs (approx.)	1,000.00	
Total	$11,200.00	
		11,200.00
Approximate amount due		$25,800.00
Damages payable to City of Cincinnati		13,000.00
Criminal Penalty payable to County of Hamilton, Balance		$12,800.00

William J. Morrissey, Judge

APPENDIX E

Order To Show Cause

(Filed August 25, 1970)

This cause coming on to be heard upon the motion of Mitchell B. Goldberg, taxpayer, intervenor herein, and it appearing that question has arisen whether adequate notice was given on an order to show cause previously issued by the Court, the Court hereby resets the date of hearing and reissues its order to show cause with a new hearing date. The Court hereby orders that the defendants Cincinnati District Council No. 51, American Federation of State, County and Municipal Employees, AFL-CIO; Aloysius Van Hagen, Staff Director, Cincinnati District Council No. 51; Nolan Tate, Jr., Staff Representative, Cincinnati District Council No. 5; James Levendusky, Staff Representative, Cincinnati District Council No. 51; Ethelrie Harper, Staff Representative, Cincinnati District Council No. 51; Stanley Harmon, President, Cincinnati District Council No. 51; James Powell, Vice President, Cincinnati District Council No. 51; Betty Colvard, Secretary, Cincinnati District Council No. 51; James E. Cooke, Treasurer, Cincinnati District Council No. 51; Municipal Garage & Inspection Lane, Local 190 of the Cincinnati District Council No. 51; Stanley Harmon, President, Local 190; James Lucas, Vice-President, Local 190; Jesse F. Wynn, Secretary, Local 190; James E. Cooke, Treasurer, Local 190; Foreman, Supervisors & Inspectors, Local 223 of the Cincinnati District Council No. 51; Earl W. Schroder, President, Local 223; Clifford R. Sharp, Vice-President, Local 223; Charles Heavering, Secretary, Local 223; Guy Smallwood, Treasurer, Local 223; Municipal Employees Local 240 of the Cincinnati District Council No. 51; Ronald Reliford, President, Local 240; Paul H. Kraft, Vice-President, Local 240; George Hanlein, Secretary, Local 240; Oliver Baker, Treasurer, Local 240; Public Employees Local 250 of the Cincinnati District Council No. 51; Charles Rice, President,

Local 250; George Riggs, Vice-President, Local 250; Gennie M. Ford, Secretary, Local 250; Solomon Marble, Treasurer, Local 250; Workhouse Employees Local 898 of the Cincinnati District Council No. 51; Smith Holbrook, President, Local 898; John Douglas, Vice-President, Local 898; John Krailler, Secretary, Local 898; Daniel Littleton, Treasurer, Local 898; Clerical, Professional & Technical, Local 1543 of The Cincinnati District Council No. 51; Hazel Grimmer, President, Local 1543; Betty Colvard, Vice-President, Local 1543; Mary E. Jones, Secretary, Local 1543; Lucille Reed, Treasurer, Local 1543; International Union of Operating Engineers Local 20; Stanley Inman, Business Representative, Local 20; also on Jesse Epps, International Representative of the American Federation of State, County and Municipal Employees, AFL-CIO; Robert Brindza, International Representative of the American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of State, County and Municipal Employees, AFL-CIO appear before this Court on the 21st day of September, 1970, at 9:30 o'clock A.M. to show cause why they should not be held in contempt of this Court for violating this Court's permanent injunction heretofore entered in this case, and upon hearing if this Court shall find that any of said defendants did violate this Court's injunction, to show cause why this Court should not punish such defendants if any, as the Court may find violated said injunction and why such defendants should not pay damages to the plaintiff for sivil (sic) contempt in such amount, if any, as the Court may find such violation has damaged plaintiff.

The Clerk shall cause a copy of this order to be served by certified mail on each of the persons or other entities named herein and ordered to show cause, in the same manner process is authorized by Rules 4.1(1), 4.2 and 4.3 of the Ohio Rules of Civil Procedure.

/s/ MORRISSEY, *Judge*

APPENDIX F

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Supreme Court, U. S.
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FEB 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, ET AL., *Petitioners*,

v.

CITY OF CINCINNATI, *Respondent*.

BRIEF OF RESPONDENT, CITY OF CINCINNATI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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BRIEF OF RESPONDENT, CITY OF CINCINNATI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent City of Cincinnati, hereinafter referred to as the City, joins with the Petitioners in their prayer that a writ of certiorari issue in this case.

PRELIMINARY STATEMENT

It may seem strange that the City, the beneficiary of a damage judgment of $12,000 against the Petitioners, should be supporting them in their attempt to overturn the judgment of the Supreme Court of Ohio. The fact is that that judgment resulted, not from any initiative taken by the City but as the result of the intervention of a citizen over the objection of the City (R. 32, 41). As Petitioners' Statement of the Case shows, the City brought an

injunction action against Council 51 and others (not including the International) on January 4, 1970 to enjoin the defendants from engaging in a strike against the City and a temporary restraining order was issued. Thereafter the City instituted contempt proceedings against Council 51 and various individuals for violation of the temporary restraining order on January 5 and 6, 1970 as a result of which Council 51 and ten individuals were held in contempt, were fined and sentenced to jail, some of the jail sentences being suspended. The strike was settled on Thursday, February 5 by agreement between Council 51 and the City, which provided that the injunction action would be dismissed, the injunction dissolved and that the City and Council 51 would join in a request for the dismissal of all pending contempt proceedings and the remission of all contempt sentences and other penalties (R. 206). This agreement was entered into by the City in good faith and the City has, in good faith, attempted to implement it. The City did in fact join with Council 51 in a motion to the trial court to dismiss the injunction action and otherwise carry out the terms of the settlement agreement (R. 60, 94, 107). These efforts were defeated by the intervention and opposition of the respondent Goldberg whose original intervention was vigorously opposed by the City (R. 32, 41). The Intervenor then instituted new contempt proceedings against the Petitioners and others. At the trial and Court of Appeals levels the City restated its position that it was not interested in recovering damages and that "justice would be better served in accordance with its Memorandum of Settlement with the defendants dated February 5, 1970. - - -". (R. 211-212). And subsequent to the filing of the petition for writ of certiorari in this Court, the City Council adopted a motion requesting the City Solicitor to support Petitioners' position.

It goes without saying that the City did not approve of nor condone the strike nor does it condone the violation of the lawful orders of the Court. However, believing as it does that due process must be afforded in all cases, the City finds merit in the reasons stated in the Petition for granting the writ.

I. THE COURTS BELOW DENIED PETITIONERS DUE PROCESS OF LAW

Although the judgment runs against Petitioners and, in part, in favor of the City, the City, as a governmental entity, has an interest and, indeed, a responsibility to see that due process is observed in litigation to which it is a party and to assure that the City does not obtain a recovery or cause punishment to be imposed unless due process has been granted its adversary. cf. *Berger* v. *United States*, 295 U.S. 78. This public responsibility is no less when the recovery is obtained or punishment imposed in a suit such as this one, in which, in effect, a taxpayer stands in the shoes of the City while the City is also a party to the suit.

It is a fact, as stated by Petitioners, that at no time prior to the decision of the trial judge had there been any intimation by the Court or by counsel for the Intervenor that Petitioners were being tried for multiple contempts. A fair reading of the record makes it clear that none of the parties tried the case on the theory that the defendants were being charged with a separate contempt for each day of the strike. The prejudicial effect of the failure to put the defendants on notice is evidenced by the complete absence of testimony concerning the status of the strike between Thursday, February 5, 1970, when the strike settlement agreement was executed and Monday, February 9, when all of the strikers were back at work. The record shows only that some of the strikers returned to work on Sunday, February 8 and the rest on Monday, February 9

and that all strike activity had ceased as of those dates (R. 140).* Had the City been on notice that the status of the strike between February 5 and February 9 was material, it would have been obligated to inform the Court, if the defendants had failed to do so, that following the execution of the strike settlement agreement on February 5 and even before it was ratified by the Union membership on February 6, the City informed the Union that the employees were to return to work starting with those who were scheduled to report on Sunday night, with the rest reporting on Monday. On this basis there could have been no question but that the strike ended on February 6. The absence of this evidence from the record as a result of the parties' ignorance of its materiality was clearly prejudicial to both Council 51 and the International.

The City supports the Petition herein because of its responsibility as a public body to see that due process of law is observed. The following from the dissenting opinion of Judge Stevens in *Groppi* v. *Leslie*, 436 F.2d 331, 336, is in point:

> "If punishment is to serve as an effective deterrent to repeated or widespread disorder, it is important that the community at large have confidence in the fairness of the proceedings which lead to conviction and sentencing.
>
> "At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense

---

* Inexplicably, the Ohio Supreme Court affirmed the finding that the defendants were in contempt on both February 8 and 9.

of decency and fair play." Burdeau v. McDowell, 256 U.S. 465, 477, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921) (Brandeis J. dissenting)."

CONCLUSION

For the foregoing reasons respondent City of Cincinnati joins with Petitioners in urging that their Petition for Certiorari be granted.

Respectfully submitted,

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1082

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Petitioners,

v.

CITY OF CINCINNATI,

Respondent,

and

MITCHELL B. GOLDBERG, A TAXPAYER,

Intervenor-Respondent.

BRIEF OF INTERVENOR-RESPONDENT OPPOSING CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1082

CINCINNATI DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, AFL-CIO, et al.,

Petitioners,

v.

CITY OF CINCINNATI,

Respondent,

and

MITCHELL B. GOLDBERG, A TAXPAYER,

Intervenor-Respondent.

BRIEF OF INTERVENOR-RESPONDENT OPPOSING CERTIORARI

THE INTERVENOR-RESPONDENT IS THE TRUE RESPONDENT

The Intervenor-Respondent is a taxpayer of the City of Cincinnati who was permitted to intervene in all courts below in order "that the public interest will be better protected and justice will be furthered."

By virtue of the common law prohibition against strikes by public employees, the petitioners were by court orders

enjoined from striking against the City of Cincinnati. Nevertheless, the petitioners for 35 consecutive days (as found by the Ohio Supreme Court) continuously and repeatedly, deliberately and intentionally violated both a temporary restraining order and the permanent injunction of the Common Pleas Court below prohibiting the strike. They openly challenged the authority of that court and brazenly flouted its orders stating that they would continue their strike until they brought "the city to its knees". (225) * Each day the strike continued, the contempt of the court's orders was repeated. The garbage piled up until its stench and disease potential became intolerable; millions of gallons of raw sewage, for lack of employees at the treatment plants, were dumped into the Ohio River, endangering the health and lives of not only the citizens of Cincinnati, but all people down stream; the waterworks operation became perilously close to breaking down in spite of the valiant efforts and overtime of supervisors and outside contractors attempting to do the work of the striking employees; the public streets fell into worse and worse disrepair, and, the ice and snow remaining untreated and unremoved, the city streets in the winter season became more and more dangerous, all because of the strike; all the other functions of the city normally performed by non-uniformed personnel were grinding closer and closer to a halt.

During the strike the petitioners through their authorized agents, continuously and repeatedly flaunted their contempt of the court's orders by continuing the strike every

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* Numbers in parenthesis refer to pages of the unprinted trial transcript, much of which was not printed below to save expense to the intervenor and his counsel, both of whom were acting without compensation. The letter R followed by a number, all in parenthesis, refers to a page in that portion of the record which was printed below.

day. Petitioners were not satisfied merely to be in contempt of court, but they further degraded the court by using their unrelenting, unmitigated, arrogant and repeated defiance of the lawful orders of the court for 35 days to coerce the city officials to yield to their demands. They thus used their very contempt of court as a weapon of coercion. The trial court in a companion case, *Goldberg* v. *Cincinnati,* in an unreported opinion held that the illegal strike had been used "to coerce" the city officials into paying the increased benefits demanded. The city officials were so thoroughly cowed that in submitting to the humiliating demands of petitioners they were required to insult the trial court by requesting that the case be dismissed and that the repeated and continuous flagrant contempts be ignored. The spectacle of having a court, which had been courageous enough to order a halt to a defiance of law by very powerful organizations, being asked to submit to the debasing indignity of permitting such orders to be flouted with impunity is intolerable in a society where the law is supposed to be supreme. As Mr. Justice Frankfurter stated in his concurring opinion in *United States* v. *United Mine Workers, et al,* 330 U.S. 258, 312 (1947), upholding large fines against John L. Lewis and the union for contempt of court:

> "There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny . . . *The greater the power that defies the law the less tolerant can this Court be of defiance*". (emphasis added)

The sole reason for the intervention of the intervenor-respondent in this case was to uphold the dignity of the court, to prevent increased disrespect for court orders and the law generally, and to protect the financial interest of the

taxpayers and citizens of Cincinnati, all of which the city officials were about to sacrifice under the coercive power of petitioners' threats of prolonging the crippling and illegal strike against the city. The intervenor is a lawyer, as of course is his counsel. As such they could not stand by and see the honor and respect due the courts disdainfully crushed under the heels of the contumacious petitioners who considered themselves above the law and by whom the city officials had become too intimidated to bring them to book. Someone had to prevent such further disgrace and insult to the court. Accordingly an application to intervene was filed under Section 733.581 of the Ohio Revised Code. (R. 17-18) Intervention was allowed under the statute because the court believed as provided therein "that the public interest will better protected and justice will be furthered". The Ohio Supreme Court upheld the intervention under Ohio law.

Intervenor and his counsel, in the spirit of the public service they were attempting to perform, waived all fees and compensation to which they might be entitled. (R. 20)

There is no doubt that the City, except for its initial show of courage at the inception of the strike, thereafter behaved in a thoroughly pusillanimous manner, and under the mounting coercive pressure of petitioners' contumacious defiance of the injunction did nothing to assist the court in seeing to it that its orders were complied with. Once the City officials had demonstrated their lack of courage in capitulating to petitioners' unlawful demands — unlawful because they were enforced by an illegal strike and contempt of court — the City officials naturally tried to justify themselves, and thereafter worked hand in glove with petitioners to try to frustrate not only the efforts of intervenor-respondent to uphold the dignity of the trial court and respect for its orders but also his efforts to obtain

for the citizens of Cincinnati restitution for what they had lost by reason of the violations of the court's orders.

Indeed in all the Ohio appellate courts and even in this Court instead of supporting the intervenor-respondent's position and the dignity of the trial court whose orders were so flagrantly violated, the City for political expediency has supported the contumacious petitioners. The Ohio Court of Appeals censured the City for such conduct. It called its brief "frivolous."

COUNTER-STATEMENT OF FACTS

Since petitioners' Statement of Facts is somewhat distorted and molded to try to support their arguments, intervenor-respondent finds it necessary to make a counter-statement of facts which will more accurately summarize the evidence and proceedings below.

On or about January 4, 1970 employees of the City of Cincinnati and members of defendant District Council No. 51 of the American Federation of State, County and Municipal Workers Union voted to strike and immediately went on strike in violation of the laws of Ohio. On the same day the City of Cincinnati in this case obtained a temporary restraining order which enjoined the strike on the basis of the common law prohibition against strikes by public employees. Within 24 hours the petitioner District Council notified its parent, the petitioner "International" in Washington of the strike (363), and the International thereafter sent their agents to support the strike (363). The temporary restraining order was completely ignored and flouted. On January 6, 1970 a permanent injunction was issued "restraining and enjoining the defendants from carrying on a strike" (R. 7) This permanent injunction was given even less respect than the temporary restraining

order, as the union leaders walked directly from the courtroom to the picket line and continued their strike in defiance of the permanent injunction (366). On January 7 the city brought contempt charges against some of the defendants, the court fined some and jailed others for a few days, and District Council 51 was fined $200.00 and posted a bond of $7,800.00.

The strike continued from January 4, 1970 to February 9, 1970 when the petitioners' members finally returned to work.

District Council 51's leaders managed the daily conduct of the strike (365) and the International's agents aided and abetted the strike and attempted to inflame the members into continued defiance of the court's orders (260-61, 235-36, 240). Both District Council leaders and the International representatives met with city officials to put pressure on the city to yield to appellants' demands (369). When the strike funds of the local union became exhausted, the International sent in $20,000.00 more from Washington to aid the strikers in continuing their contumacious flouting of the court's orders.

The International's representative, Epps, in an effort to put additional pressure on the city threatened to tie up the leading restaurants in the city during the busiest hours by having the strikers take all the seats and order just coffee, and to ruin the downtown clothing stores by having the strikers exclude regular customers by crowding into such stores and trying on clothes continuously (235-36, 240). When this was brought to the Common Pleas Court's attention, it supplemented the earlier permanent injunction by enjoining such conduct (236). This supplementary injunction was likewise defied. Under the instigation of the International's representative, Epps, a large group of strikers invaded the Stouffer's Inn restaurant just before lunch

time, ordered coffee and took up all of the unoccupied spaces so that regular customers could not be served (254). As the contumacious strike continued, on February 5, 1970 the city officials, being forced into submission by their fears of public chaos, panic and epidemics, yielded to the petitioners' demands, agreeing to pay increases which were demanded in consideration of the petitioners' ceasing their illegal strike and contempts of court. The strikers did not return to work until February 9, 1970 (297). The appellee-intervenor on February 6, 1970 filed its application to intervene (R.17). The Common Pleas Court held the matter in abeyance and granted the application on June 2, 1970. Thereafter, appellee-intervenor filed a motion for an order against the present petitioners, all the local unions, 33 individuals, and in addition two of the International's representatives, Epps and Brindza, to show cause why they should not be held in contempt for their conduct in furtherance of the illegal strike and why they should not be required to pay damages to the city for the losses incurred by reason of their contempt (R. 55). The Court issued an order to show cause pursuant to such motion, and, thereafter, in order to give defendants more notice, on August 25, 1970 reissued the order (R. 62).

In its judgment the trial court, at the suggestion of Intervenor's counsel, showed mercy to the individual contemnors and granted judgment only against the petitioners, the labor organizations who instigated and continued the strike.

The trial court found that the City had suffered provable damages in excess of $500,000 and millions more too difficult to prove in dollar amount, but that to enter judgment against petitioners in any amount that was really deserved would bankrupt petitioners which the court did not want to do. Hence the court decided to fine the petition-

ers in only a relatively nominal amount of $1,000 per day for each day of the strike or $37,000, the fine to cover both punishment and damages. In its desire to be lenient the court also credited against that total all fines and bonds paid in connection with previous contempt convictions of individual members, resulting in a net to the City of only $13,000.

Petitioners concede that the strike was supported by petitioner District Council 51 from its inception to its conclusion (Petitioner's Brief in the Ohio Supreme Court p. 8). Although petitioners admit that the International was called about the strike within 24 hours after it started (Id. p.9) they deny that it knew of the injunction or that it participated until much later. We have already shown that it would be reasonable to infer that the International was advised of the restraining order at least as soon as that same call. The record also shows that the representatives sent by the International from Washington to assist the local leaders visited local leaders who were jailed on January 7 for a few days for contempt of the court's injunction, and it was specifically acknowledged that such International representatives knew that the leaders on whom they called were in jail for violating the injunction (366).

Brindza, one of the International representatives sent from Washington, made a speech to union members on January 17, 1970, saying at (260):

> "Everything is breaking *our* way and looking rosy. They took away *your* leaders, they took away *your* pickets, they did not take away *your* soul, *we* have soul power. *We* haven't spent two weeks out for nothing. These three leaders didn't spend nine days in the workhouse for nothing". (emphasis added)

Brindza very well understood as is indicated from the quotation the difference between the first person pronoun

and second person pronouns. When Brindza used the word "we", referring to the two weeks prior to January 17, he identified the International with the strike from its inception.

Moreover, International representative Epps would not deny that he encouraged the employees to remain on strike (59-60). The record also showed in the testimony of others that Epps was a supporter of the strike (238). Indeed every union leader which the witness heard speak to the members, including Epps, supported the strike (246). The witness further testified that the union leaders "were resolute in the strike" and "that they were going to carry on until they got what they wanted" (225). It was further testified that Epps had stated that the workers would go into the good restaurants, have coffee during the lunch hour, occupy all available tables, and would go into the clothing stores and try on clothes (235, 236, 239, 254).

Van Hagen admitted that the International's representatives were present at various meetings with the city officials endeavoring to get the city to yield to the appellants' demands (367-369). Also, it is admitted that the International contributed $20,000.00 to the strike funds when the local money ran out. Petitioners' counsel tries to claim that this $20,000.00 was not in support of the strike, but was only motivated by eleemosynary considerations similar to "care packages" to the victims of the Nicaraguan earthquake. Although there is no doubt that petitioners' counsel is a very brave man, it is astonishing that he could be so audacious as to make so hypocritically cynical an assertion.

Thus it is plain that the International supported the strike in violation of the trial court's restraining order and injunction from beginning to end.

Petitioners claim there was no evidence of strike activity after February 5, 1970 when the city surrendered to the

union's demands. The fact, however, is that the employees did not return to work until the 9th of February. If the appellants did not get the employees back to work until the 9th even though an agreement was reached on the 5th, the strike effectively continued and the damage to the City continued, until the employees returned to work on February 9th, so the petitioners may be held responsible for that time as well. As experienced labor organizations, the petitioners would have to know that this would be a reasonable consequence of their acts. The law charges everyone with the reasonable consequences of his own conduct.

ARGUMENT

I.

THIS IS NOT A CASE FOR CERTIORARI. THERE IS NOTHING NOVEL OR OF SPECIAL IMPORTANCE IN THIS CASE

This case is nothing more than an open and shut contempt case involving primarily factual matters which were in the domain of the trial judge below as the trier of fact. The legal points raised by petitioners have been decided time and again against their contentions, and raise no novel or unique questions of law or of general importance. Indeed, the trial court's judgment was affirmed by the Court of Appeals and the Supreme Court of Ohio, who analyzed the identical issues raised by petitioners herein and found against them.

The trial court heard all of the evidence and testimony concerning the violation and decided as a matter of fact that petitioners continuously violated the permanent in-

junction. The trial court proceeded to impose penalties and assess damages and restitution to the prime injured party, the City of Cincinnati. The penalties and damages were well within the framework of the law and there was no abuse of discretion. Moreover, the evidence established that the penalties imposed and the order of restitution or damages was far less than the possible penalties and damages that could have been assessed under the law. This case, therefore, is no different from the thousands of contempt cases on the dockets of the courts throughout the United States each day. While this case was on a somewhat larger scale than some, the principles of law remain the same.

The claimed constitutional issues raised by petitioners when analyzed simply involve rehashing basic legal points that have been decided time and again as being constitutionally valid. The due process requirements raised by petitioners are not disputed by the intervenor or by the courts below, but were not violated here. The cases cited by petitioners merely state that due process requires that they be notified with reasonable specificity of the charge against them in order that they may prepare their defense. All of the courts below found that factually these requirements were met. As shown *infra* the action below simply followed the pattern of similar cases where there is continuing contempt of an order proscribing a general course of conduct. Petitioners have cited no case to the contrary.

Petitioners parenthetically raise the claim of a right to a jury trial in contempt cases. The law is well settled that there is no right to a jury in contempt actions for violation of injunctions because of the equitable nature of the proceedings. The contempt arises out of the violation of an order in equity. The purpose of civil contempt proceedings is to secure the dignity of the courts and the uninter-

rupted and unimpeded administration of justice. *Windham Bank* v. *Tomaszczyk*, 27 Ohio St. 2d 55, 58 (1971). The primary purpose, therefore, is to enforce equity and is not the recovery of money only, or specific real or personal property (the Ohio statutory requirements for jury trial which expanded the right to trial by jury as set forth in the Ohio Constitution). Any damages that are awarded by the court are for the purpose of granting full remedial relief to the party injured by the violation and are merely ancillary to the main relief sought. To require jury trials in equity cases would ignore age old legal precedents which go back to the common law of England.

II

A CHARGE OF CONTEMPT WHICH ALLEGES A CONTINUOUS VIOLATION OF A COURT ORDER, IN THIS CASE THE MAINTENANCE AND SUPPORT OF AN ILLEGAL STRIKE WHICH WAS ENJOINED, IS EQUIVALENT IN LEGAL EFFECT TO A CHARGE OF SEPARATE CONTEMPTS FOR EACH DAY THE INJUNCTION IS VIOLATED

No one disputes the proposition that due process requires that a defendant charged with contempt be advised with what he is charged. No one quarrels with the cases to that effect cited by Petitioners, but all this is just a false straw man issue in the case at bar.

The trial court in this case issued a permanent injunction "restraining and enjoining the defendants from carrying on a strike." (R. 7). This was a case where the actual strike itself was enjoined instead of particular actions such as mass picketing, violence, blocking of entrances, or the

like. In the latter cases, a contempt charge, in order to comply with constitutional requirements of due process, would have to allege with specificity the committing of the particular violations which were enjoined, such as the time, place and description of the examples of violence, in order that the alleged violator be notified of the charges against him and so that he can adequately prepare his defense.

Such was not the situation, however, in the case at bar. The petitioners were not enjoined from or charged with specific, separately identifiable acts; they were enjoined from maintaining a continous course of affirmative general conduct, i.e. "carrying on a strike". Petitioners have conceded below that they were charged with a continuous course of contempt of court over the entire period of the strike. (Petitioners' Brief to the Supreme Court of Ohio p. 17.) Obviously then, when they are charged with a continuous violation and continuous contempt throughout the entire period of the strike (35 days as found by the Supreme Court of Ohio) the charge necessarily accuses them of violating the court's order every minute, every hour and every day during the period. The only reasonable interpretation of the charge put them on notice that they were being charged with certainly no less than a violation and a contempt of the court's order each and every day of the strike.

Courts at common law historically have divided continuous extended periods of time into days as the shortest divisible period, and the legal adage is well recognized that "the law knows no fraction of the day." *11 Words and Phrases,* Day p. 179 (1971). See also *Greulich* v. *Monnin,* 142 Ohio St. 113, 50 N.E. 2d 310 (1943); *Kuznitsky* v. *Murphy,* 381 Ill. 182, 44 N.E. 2d 893 (1942).

The trial court below, therefore, looked upon the continuous violation of the injunction as separate contempts

each day the violation continued. This has been the practice used by almost every court faced with such a continuous violation of an order enjoining a general course of conduct. For example, this Court has ordered that the City of New York pay $5,000.00 per day until it complied with the order to cease polluting the ocean, shores and beaches of New Jersey, the polluting being a continuous violation. *New Jersey* v. *City of New York,* 290 U.S. 237 (1933). In the famous *Meredith* cases, *Meredith* v. *Fair,* 313 F. 2d 532 and 313 F. 2d 534 (5th Cir. 1962) the court ordered Governor Barnett of Mississippi to pay a fine of $10,000.00 per day and his agent Paul B. Johnson, Jr. $5,000.00 per day for every day they failed to comply with the court's restraining orders. The Supreme Court of Massachusetts stated in *Commonwealth* v. *Town of Hudson,* 315 Mass. 335, 347, 52 N.E. 2d 566, 574 (1943):

> "Where the duty to perform the decree continues and performance remains possible it is hard to see why repeated penalties may not be imposed for failure to obey during successive periods of time. (cases cited)"

There are relatively few reported cases where the court as in this case, fixed the penalty or damages after the violation had terminated. This is because in the usual case the plaintiff (in this case the City of Cincinnati) will see to it that the punishment is fixed in advance so as to prevent the continuous violation. However, in all of the reported cases where the issue was subsequently presented to the court after the violation had terminated, the court held retrospectively also that each day the violation continued constituted a contempt of court.

In *Madden* v. *Grain Elevator, Flour & Feed Mill Workers,* 334 F. 2d 1014 (7th Cir. 1964), the regional director of the N.L.R.B. sought injunctive relief against a union for

committing a secondary boycott. A restraining order was issued and subsequently violated. The court found contempt and fined the union $100.00 per day retroactively, 334 F.2d at 1017. Later when the union continued to flout the court order the fine was raised first to $500.00 per day *nunc pro tunc* and then to $3,000.00 per day, prospectively.

To the same effect, see *Solono Aquatic Club* v. *Superior Court of Solono County,* 165 Cal. 278, 131 P. 874 (Cal. Sup.Ct. 1913), wherein the defendant continued to operate its ferry service in violation of restraining order for three days. Each day was treated as a separate contempt. See also, *Hickinbotham* v. *Williams,* 228 Ark. 46, 305 S.W. 2d 841 (1957) where defendant who was enjoined from operating his store on Sundays continued in violation of court injunction to operate for 32 successive Sundays. The court held:

> "Each violation, of course, constituted contempt. To hold otherwise would have the effect of saying that once an order had been disregarded, it could thereafter be violated with impunity, and punishment rendered only for the original violation. Petitioner's argument is patently unsound." 228 Ark. at 50-51, 305 S.W. 2d at 843-44.

III

A CHARGE WHICH ALLEGES A CONTINUOUS COURSE OF CONDUCT EXISTING OVER SUCCESSIVE DAYS IS ALL THAT IS REQUIRED TO MEET THE DUE PROCESS REQUIREMENTS OF SPECIFICITY.

Since it was the illegal strike itself which was enjoined by the trial court and since the charge was that the petitioners supported and continued the strike from beginning

to end, there was no occasion to specify any particular acts of the petitioners in violation of the injunction. As stated above, this was not a case of an injunction against mass picketing or violence where allegations of specific acts are required to prove contempt. The continuation of the strike was itself a violation, and every day the strike continued was a further violation of the injunction. At the very outset of trial, counsel for petitioners were so advised. Intervenor's counsel pointed out to the trial court, in answer to petitioners' oral motion for further specification, that since a continuous course of contumacious conduct from beginning to end of the strike was charged, further specification of particular acts might have taken away from the continuing nature of the charge and was wholly unnecessary (R. 18). It did not have to be shown what specific acts the petitioners did each and every day; but merely that they did not discontinue the strike as required by the injunction.

Petitioners have conceded that District Council 51 supported the strike from beginning to end. Furthermore, the evidence was overwhelming, and the trial court so found from the evidence, that the International likewise supported the strike from beginning to end. Once the strike was started, the violation continued and was repeated each day until the strike was stopped. Affirmative action by petitioners was required to end the strike just as in *United States* v. *United Mine Workers of America,* 330 U.S. 258 (1947). Further specification was not required.

IV

PETITIONERS WERE NOT PREJUDICED EVEN IF THEIR CONDUCT WERE TREATED AS ONLY ONE CONTEMPT EXTENDING OVER THE ENTIRE PERIOD RATHER THAN SEPARATE CONTEMPTS EACH DAY.

Courts have the inherent right to punish for violation of their orders, which right cannot be limited by the legislature under Ohio law. The Supreme Court of Ohio below so held (p. 12a of Petitioners' Petition), following *State* v. *Local Union 5760,* 172 Ohio St. 75, 173 N.E. 2d 331 (1961). Consequently, the court had the right to impose a fine and damages in the total amount which it did impose, even if the petitioners' conduct be considered as if it were only one contempt. Such a punishment would have been reasonable since the course of conduct was the same insofar as petitioners' actions were concerned whether it be called one continuous violation over the period of the strike or separate violations for each day. Each of the separate contempts were the same as the others, i.e., that the petitioners conducted a strike in violation of the permanent injunction. (Opinion of the Ohio Supreme Court p. 7a of Petitioners' Petition in this Court). Hence petitioners could not possibly have been prejudiced.

Never have petitioners articulated in what particulars they were claiming to have been prejudiced. Their defense could not have been affected. Since they knew they were charged with violating the injunction continuously each and every day, expressly calling each day a separate contempt could not change the facts or enable them to put up any different defense. Moreover, District Council 51 admits that it supported the strike from its inception

to its conclusion (p. 15 of Petitioners Petition) so its guilt every day is admitted. The evidence as found by the trial court established that the International likewise participated from beginning to end. At no time did the International attempt to show the contrary in their case; so it likewise could not have been prejudiced.

It is true that the petitioners did not have notice of what the final penalty or damages would be, but no one knows in advance what penalty or damages a court will impose. That is up to the court. They did have notice (as shown above) when they were charged with having continuously violated the court's order that they were subject to being held in contempt for each day their violations continued.

CONCLUSION

Petitioners have shown no ground for certiorari. This is just a run of the mine contempt case involving continuous violation of a court order prohibiting a general course of conduct, and this case simply followed the usage in such cases.

Petitioners received a fair hearing which conformed in every respect to the requirements of due process of law. They were duly notified of the charge against them; they were given a full opportunity to prepare their defense, call witnesses in their behalf and present evidence; through their unusually able legal counsel they took advantage of every possible benefit allowed by law. The continuous contempts, however, in this case were so blatant and outrageous that no trier of fact could have found in their favor. The trial court imposed penalties and damages which were not only within the confines of the law but

minimal in the light of the aggravated contempt and tremendous damages suffered by the City and its citizens.

It is for all the above mentioned reasons that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JEROME GOLDMAN

Attorney for
Mitchell B. Goldberg, a taxpayer
Intervenor-Respondent

Of Counsel:

MITCHELL B. GOLDBERG

APPENDIX A

Section 733.581 of The Ohio Revised Code

If the city solicitor, upon the written request of any taxpayer of the municipal corporation, makes any application provided for by sections 733.56, 733.57, or 733.58 of the Revised Code, such taxpayer may be named as a party defendant and if so named shall have the right to assist in presenting all issues of law and fact to the court in order that a full and complete adjudication of the controversy may be had.

In any civil action or proceeding involving the public interest the court shall grant the application of any person to intervene if the court believes that the public interest will be better protected or justice will be further.